INDEX

	Page
Opinions below	1
Jurisdiction	2
Question presented	2
Statute involved	2
Statement:	
A. The Board's findings of fact	2
B. The Board's decision and order	4
C. The decision of the court of appeals	5
Reasons for granting the writ	6
Conclusion	12
Appendix A (opinion and decree below)	1a
Appendix B (statute involved)	13a

CITATIONS

Cases:

American Ship Building Co. v. *National Labor Relations Board*, 380 U.S. 300	5, 8
National Labor Relations Board v. *Erie Resistor*, 373 U.S. 221	6, 7, 8, 9, 11
National Labor Relations Board v. *Truck Drivers Union*, 353 U.S. 87	8

Statute:

National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*):	
Section 7	7
Section 8(a)(1)	2, 4, 6, 7, 9
Section 8(a)(3)	2, 4, 6, 7, 9

In the Supreme Court of the United States

OCTOBER TERM, 1966

No.

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

GREAT DANE TRAILERS, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Solicitor General, on behalf of the National Labor Relations Board, petitions for a writ of certiorari to review the decision of the United States Court of Appeals for the Fifth Circuit entered in this case on June 24, 1966.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, pp. 1a-11a) is reported at 363 F. 2d 130. The findings of fact, conclusions of law, and order of the National Labor Relations Board (R. 22-40, 56-59)[1] are reported at 150 NLRB 438.

---

[1] "R." refers to "Volume I, Transcript of Record" and "J.A." refers to the Joint Appendix, both of which were filed in the court of appeals.

JURISDICTION

The decision of the court of appeals was rendered on June 24, 1966, and a decree was entered on July 21, 1966 (App. A, *infra*, p. 12a). By orders dated September 21 and October 20, 1966, Mr. Justice Black extended the time for filing a petition for certiorari to and including November 18, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

The Board found that the employer denied accrued vacation pay to striking employees who did not return to their jobs within about six weeks after a strike began, while awarding such benefits to those employees who did not strike or who abandoned the strike at an early date. The question presented is whether the Board properly held that this conduct violated Section 8(a)(1) and (3) of the National Labor Relations Act, in the absence of specific evidence of the employer's subjective intent to discriminate aginst the strikers.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), are set forth in Appendix B, *infra*, pp. 13a-14a.

STATEMENT

A. The Board's Findings of Fact

The collective bargaining agreement between the company, a manufacturer and seller of truck trailers

(R. 9, 11-12), and the Union [2] provided that employees with more than sixty days' service would receive vacation pay on the Friday nearest July 1 each year (J.A. 36-38). Employees who worked a total of 1,525 hours during the year qualified for the maximum vacation pay specified in the contract; those who worked fewer hours were awarded proportionately lower benefits, according to a contract schedule. The contract also provided that "[i]n case of lay-off, termination or quitting, an employee who has served more than sixty (60) days shall receive [a] pro rata share of vacation" pay (J.A. 38). There was no requirement that employees had to be at work on July 1 to qualify for vacation pay benefits.

This contract was effective until March 31, 1963, and thereafter from year to year unless terminated by notice of either party (R. 23-24; J.A. 36, 41). On April 30, 1963, following a temporary extension of the contract, the Union gave the Company timely notice of its intention to terminate the contract as of May 16, 1963. On that date, the Union began a strike in support of its contract demands, which was joined by about 350 of the Company's 400 employees (R. 25; J.A. 10, 12-13, 32, 41, 43). By July 1, about 260 strikers had been replaced, and a small number of strikers had returned to work. Some strikers also returned to work after that date, apparently as "new" employees (R. 25-27; J.A. 27-28, 32-33). The strike

---

[2] Local 26, International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, AFL-CIO, represented the employees at the Company's Savannah, Georgia plant.

was formally terminated in December 1963 (R. 25; J.A. 47-48).

On July 12, the strikers, all of whom had worked more than sixty days in the preceding year, requested their accrued vacation pay. The Company refused, stating that, since the Union had terminated the contract, no provision for vacation pay was in effect and that such payments, if any, would be subject to bargaining (R. 26; J.A. 11, 13-14, 42, 44-45, 46-47). In August, however, the Company made vacation payments to employees, qualified to receive such benefits, who had not gone on strike or had abandoned the strike and were at work on July 1. According to Company officials, these payments were not made pursuant to the prior contract, but in accordance with a "policy" embodying "substantially the same" provisions (R. 27; J.A. 35). The Company gave various explanations for its refusal to make similar payments to strikers who had been replaced or who had not abandoned the strike by July 1: (1) there was a "break in length of service," (2) these employees "were not working as of July the 1st," and (3) "they were replaced and discharged, in other words they were not employees of ours" (R. 26-27; J.A. 30-31).

B. The Board's Decision and Order

Upon the forgoing facts the Board held that the Company, by denying accrued vacation pay to strikers who had not abandoned the strike before July 1, unlawfully discriminated against them because of their adherence to the strike, in violation of Section 8(a)(1) and (3) of the Act. The Board held that the

strikers were entitled to "be treated uniformly with non-strikers with respect to whatever benefits accrue to the latter from the existence of the employment relationship" (R. 57-58). Accordingly, the Board ordered the Company to cease and desist from its unfair labor practices and to reimburse strikers for vacation pay unlawfully withheld from them (R. 49-50, 58).[3]

C. The Decision of the Court of Appeals

The court of appeals refused to enforce the Board's order. It held that the disparate treatment of strikers and non-strikers, without more, was insufficient to show an unfair labor practice. It construed this Court's decision in *American Ship Building Co.* v. *National Labor Relations Board*, 380 U.S. 300, as establishing "that if the 'employer's conduct' carries with it *any other* reasonable inferences of a *legitimate motive*, the inference of illegality does not control" (App. A, *infra*, p. 9a; emphasis in original). Recognizing that "the record does not reveal any such alternative motives," the court nevertheless inferred that the Company might have awarded benefits to non-strikers and those who quickly abandoned the strike but not to other strikers for the following reasons: "(1) to reduce expenses; (2) to encourage longer tenure among present employees; or (3) to discourage early leaves immediately before vacation periods" (App. A, *infra*, p. 9a). It held that, since there was no "circumstantial evidence on which to

[3] The Board's order does not award vacation pay to the strikers based on any period in which they were on strike (R. 58, n. 2).

base an inference of improper motive," the Board's decision had no support in the record (App. A, *infra*, p. 11a).

REASONS FOR GRANTING THE WRIT

The holding of the court of appeals that it was not an unfair labor practice for the Company to deny accrued vacation pay to strikers who had not returned to their jobs by July 1, while awarding such pay to other employees, is contrary to this Court's decision in *National Labor Relations Board* v. *Erie Resistor*, 373 U.S. 221, and, if allowed to stand, would permit widespread discrimination in regard to important contractual benefits against employees exercising their right to strike.

1. In *Erie Resistor*, the Board had found that the employer discriminated against striking employees, in violation of Section 8(a)(1) and (3) of the Act, by awarding super-seniority to replacements and to strikers who had abandoned the strike and returned to work. This Court upheld the Board's finding of an unfair labor practice, even though there was no specific evidence of subjective intent to discriminate against the strikers and the employer claimed his action was essential to enable him to continue operating. The Court held that the Board properly found the requisite intent in "the inherently discriminatory or destructive nature of the [employer's] conduct itself" and properly concluded that the employees' interest in concerted action outweighed the business interests which allegedly underlay the super-seniority program (373 U.S. at 228, 236-237). This decision,

which was not even cited by the court below, should have been controlling here.

To be sure, there are differences between Erie Resistor's super-seniority plan and respondent's vacation pay "policy," but none of them is material here. The crucial element in both cases is that the employer's conduct, by its very nature, discriminated against employees who exercised their right to strike, a right guaranteed by Section 7 of the Act.[4] Although the Company's action was not in terms based upon strike activity, its necessary effect was to accord unfavorable treatment, *vis-à-vis* other workers, to strikers who had not returned to their jobs by July 1—and to these employees alone. As in *Erie Resistor*, regardless of any legitimate business purpose the employer's conduct might serve, "his conduct *does* speak for itself—it *is* discriminatory and it *does* discourage union membership and whatever the claimed overriding justification may be, it carries with it unavoidable consequences which the employer not only foresaw but which he must have intended" (373 U.S. at 228; emphasis in original).

2. The court below ignored this Court's holding in *Erie Resistor* that conduct, such as respondent's, "which carried its own indicia of intent * * * is barred by the Act unless saved from illegality by an overriding business purpose justifying the invasion

---

[4] As the Court pointed out in *Erie Resistor*, 373 U.S. at 233, Section 8(a)(1) protects the right to strike against employer interference and Section 8(a)(3) forbids discrimination in terms of employment to discourage participation in a legitimate strike.

of union rights" (373 U.S. at 231). Instead, it held that the inference of illegal intent is totally dispelled if "the employer's conduct carries with it *any other* reasonable inferences of a *legitimate motive*," even if the employer himself does not proffer any such explanation (App. A, *infra*, p. 9a; emphasis in original). This approach was expressly rejected in *Erie Resistor*.[5] The presence of a legitimate business motive does not automatically eradicate the natural inference of unlawful intent arising from inherently discriminatory conduct, as the court below held. Rather, it is necessary to balance "in the light of the Act and its policy the intended consequences upon employee rights against the business ends to be served by the employer's conduct" (373 U.S. at 229). This the Board correctly did.[6]

---

[5] Indeed, as this Court pointed out in that case (373 U.S. at 229, n. 8): "In a variety of situations, the lower courts have dealt with and rejected the approach urged here that conduct otherwise unlawful is automatically excused upon a showing that it was motivated by business exigencies."

The court below misconstrued the quotation from the *American Ship Building* case, upon which it relied. The language quoted by the court below (App. A, *infra*, p. 8a) was not part of this Court's essential holding (not relevant to any issue in the present case) that the employer's use of a lockout was not an unfair labor practice. The quoted statements were merely part of the background for the Court's decision in that case; in essence, they were a restatement of the principles governing the decision in *Erie Resistor*. Surely, there was no intention in *American Ship Building* to modify the *Erie Resistor* decision.

[6] The following statement from *National Labor Relations Board* v. *Truck Drivers Union*, 353 U.S. 87, 96, quoted with

a. The employee right affected by respondent's discriminatory conduct is the right to strike—a right for which Congress has shown "repeated solicitude" and to which this Court has consistently accorded "generous interpretation." See *National Labor Relations Board* v. *Erie Resistor*, 373 U.S. 221, 233-234, 235, and cases cited. The penalty which the Company imposed upon its striking employees cannot be reconciled with the privileged position the right to strike occupies in the scheme of the Act. The fact that the Company did not deny vacation pay as a means of "breaking" the 1963 strike is immaterial. For, as the trial examiner found, the conduct was designed "to retaliate against the strikers for having engaged in * * * concerted activity" (R. 33). The effects of this retaliation on the future exercise of the right to strike and upon employee relations in general are obvious. But even if the Company's action had no deleterious future consequences, its discrimination against employees with regard to substantial rights,[7] solely because of strike activity, cannot escape the prohibitions of Section 8(a)(1) and (3).

---

approval in *Erie Resistor*, 373 U.S. at 236, is apposite here:

> "The ultimate problem is the balancing of the conflicting legitimate interests. The function of striking that balance to effectuate national labor policy is often a difficult and delicate responsibility, which the Congress committed primarily to the National Labor Relations Board, subject to limited judicial review."

[7] The strikers were deprived of accrued benefits up to a maximum of the equivalent of 80 hours' pay (J.A. 36-38).

b. No legitimate business purpose overrides the interests of the strikers who were discriminated against here. Indeed, it is doubtful whether an employer can ever adduce legitimate business considerations to justify retaliation against employees who exercise their right to strike. In any event, as the court below acknowledged, the Company advanced no such explanation in this case.[8] And the reasons which the court itself conjectured (*supra*, p. 5) do not explain, much less justify, withholding of accrued benefits from the strikers.

3. The implications of the decision below extend beyond vacation pay benefits, important as they are in modern industrial relations. The court's rationale would apply to the great variety of fringe benefits—for example, bonuses, profit sharing and pension rights—to which many employees are contractually entitled today.[9] The decision below per-

---

[8] The court below obviously rejected the Company's assertions that the disparate treatment of the strikers was justified because of their absence on July 1, the break in their service, or the loss of employee status (*supra*, p. 4). None of these considerations was relevant under the contract or the Company's unilaterally adopted "policy", which admittedly followed the contract's vacation pay provisions. Under the contract, continuity of service was a factor only in determining how much vacation pay an employee (with more than sixty days' service) would receive. And employee status as of July 1 was not required. Any employee who had worked more than sixty days was entitled to a *pro rata* share of vacation pay, even "in case of lay-off, termination or quitting" prior to July 1 (R. 36-38).

[9] Under the decision below (absent specific evidence of illegal intent), practically any discrimination with respect to financial benefits would seem permissible, since one could

mits employers to exact a forfeiture of the benefits which have accrued under such plans against employees who exercise their right to engage in a lawful strike, unless the Board can adduce specific evidence—apart from the forfeiture itself—of the employer's subjective intent to discriminate against striking employees. This decision—manifestly contrary to this Court's ruling in *Erie Resistor*—would seriously inhibit the exercise of the right to strike. Moreover, it promotes confusion as to the kind of employer conduct which may properly be found to carry "its own indicia of intent" and the kind of business justification sufficient to excuse "the invasion of union rights" (373 U.S. at 231). The decision should not be allowed to stand.

---

readily attribute to such action one of the "legitimate motives" the court inferred here—*i.e.*, "to reduce expenses" or "to encourage longer tenure among present employees" (App. A, *infra*, p. 9a).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

THURGOOD MARSHALL,
Solicitor General.

JEROME I. CHAPMAN,
Assistant to the Solicitor General.

ARNOLD ORDMAN,
General Counsel,

DOMINICK L. MANOLI,
Associate General Counsel,

NORTON J. COME,
Assistant General Counsel,

MALCOLM D. SCHULTZ,
Attorney,

National Labor Relations Board.

NOVEMBER 1966.

APPENDIX A

IN THE

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 22427

NATIONAL LABOR RELATIONS BOARD, PETITIONER

versus

GREAT DANE TRAILERS, INC., RESPONDENT

Petition for Enforcement of an Order of the National Labor Relations Board, sitting at Washington, D. C.

(June 24, 1966.)

Before RIVES and GEWIN, Circuit Judges, and ALLGOOD, District Judge.

GEWIN, Circuit Judge: This case is before the Court upon the petition of the National Labor Relations Board (Board) for enforcement of its order issued against Respondent, Great Dane Trailers, Inc. (Company) to cease and desist from certain activities found by the Board to be violative of Section 8 (a) (3) and (1) of the National Labor Relations Act, 29 U.S.C.A. § 158(a) (3) and (1). The case is reported at 150 NLRB No. 55 [438].

For a number of years the International Brotherhood of Boilermakers, Iron Ship Builders, Black-

smiths, Forgers and Helpers, Local No. 26, AFL-CIO (Union) has been the collective bargaining representative of the employees at the Company's Savannah, Georgia, plant. The last contract between the Union and the Company was effective by its terms until March 31, 1963, and from thereafter until unilateral termination by either party upon 15 days notice. The contract contained the following pertinent provisions:

> "(a) Each qualified employee covered by this agreement shall be entitled after one (1) year of continuous employment, at a time agreeable to the Company, to a vacation of seven (7) consecutive days with pay for forty (40) hours at the rate of pay existing for such employee at the time of the beginning of his vacation. Each employee after five (5) years continuous service, shall be entitled to a vacation of fourteen (14) consecutive days, with pay for eighty (80) hours. Any employee entitled to a vacation with pay may waive the right, if his services are needed by the employer, to such vacation during the period of this agreement, and in such cases shall be entitled to receive in lieu thereof, at the time he becomes entitled to the vacation, the amount of vacation pay such employee would otherwise have received over and above the wages received for work performed during the vacation period.
>
> "(b) To qualify for said vacation, it is necessary that an employee shall have worked a total of fifteen hundred twenty-five (1525) hours in the said year; any time lost, however, because of an industrial accident while employed by this Company to count as part of the qualifying time.

"(d) Employees who have served less than sixty (60) days on the next July 1 after date of employment will receive no vacation pay on that date but on the following July 1 will receive the vacation due in accordance with the above qualifying requirements, plus extra amount due in accordance with hours worked.

"(e) In case of lay-off, termination or quitting, employee who has served more than sixty (60) days shall receive pro rata share of vacation.

"(f) All vacation pay shall be paid on Friday nearest July 1st, except as outlined in paragraph (d)."

On April 30, 1963, the Union gave notice terminating the contract, and on May 16 approximately 348 of the Company's 400 employees went on strike.

On July 12, 1963, a large number of striking employees demanded vacation pay allegedly due them under the provisions of the contract quoted above. The Company responded that since the formal contract with the Union had been terminated, it had unilaterally altered Company "policy" regarding vacation pay and that only those employees who were on the job July 1 of that year would receive any benefits. In the case of returning employees who had not been replaced, there was no break in service. The Company emphasized that while it had adopted substantially all of the vacation pay provisions of the prior contract, it was not granting vacation pay pursuant to that contract. It is admitted that vacation benefits were actually paid to all employees who met the contract qualifications but either did not strike on May 16, or abandoned the strike and returned to work before they were replaced.

In October 1963, the Union filed a complaint with the Board charging the Company with violation of Section 8(a)(3) and (1) of the Act by refusing to grant vacation pay due the striking employees under the terms of the contract because of their adherence to the Union's strike.

During the subsequent hearing before the trial examiner, the Company took the position that the contract giving the employees the right to vacation pay was no longer in effect and that even if it were still in effect, the Board could not properly exercise its jurisdiction to construe and enforce its terms, since such jurisdiction rests in state and federal courts by virtue of Section 301 of the Labor-Management Relations Act, 29 U.S.C. § 185(a).[1] The hearing examiner concluded that the refusal to give vacation pay constituted a Section 8(a)(3) and (1) violation and recommended an order requiring the payment of such benefits. The Board reviewed the proceedings and adopted the conclusions of the trial examiner for the following reasons:

> "We agree with the Trial Examiner that the denial of vacation pay to strikers who had not abandoned the strike by July 1, 1963, unlawfully discriminated against them because of their adherence to the Union's strike. Whether vacation pay was granted to those employees who were

---

[1] § 185(a):

"Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties."

> actually working on July 1, pursuant to the provisions of the expired contract, or was granted, as the Employer contends, as a unilaterally adopted policy formulated after the expiration of the contract is immaterial. Any striker who had not yet been permanently replaced was entitled, as an employee under Section 2(3) of the Act, to be treated in the same fashion as other employees. And even those strikers who had been permanently replaced before the date of payment of vacation benefits were entitled to a pro-rata share, either under Article VIII(e) of the expired contract, or under the unilateral policy of the Employer which admittedly adopted substantially the same provisions on eligibility."

The Company here contends the Board erred because (1) its decision and order were necessarily grounded upon the construction of a collective bargaining agreement, and enforcement by the Board of a labor contract is contrary to the policies of the Act; and (2) alternatively, there was insufficient evidence to sustain the finding that the Company was motivated by anti-union sentiment in refusing to distribute the vacation pay benefits allegedly owed the striking workers.

We first turn to the question of whether the Board acted improperly by exercising its jurisdiction over this matter. The Company has consistently asserted that its policy of granting vacation pay is a purely unilateral action taken without any reference to the now-terminated collective bargaining contract. It is undisputed that such a "policy" is a "term or condition of employment" as described by Section 8. Those striking employees who had not been replaced are definitely "employees" within the meaning of Section

152(3) of 29 U.S.C.A.[2] Therefore, if it is alleged that the Company discriminated between striking and non-striking "employees" in regard to the "term or condition of employment" as proscribed by Section 8(a)(3) and (1), the Board clearly acted properly in exercising its authority to hold an inquiry and effect an appropriate remedy, if one is warranted, since this is an unfair labor practice charge in simplest terms. Thus, we can disregard the question of whether the Board *would* have acted improperly in exercising its jurisdiction to decide whether it was an unfair labor practice to withhold benefits due *under the contract*,[3] or whether such action would have violated the policies of the Act.

We next turn to the substantive issue of whether the Board had sufficient evidence to conclude the Company was motivated by anti-union sentiment in withholding vacation pay in violation of Section 8(a)(3) and (1). As the Supreme Court said in *American Shipbuilding Co.* v. *N.L.R.B.*, 13 L.Ed.2d 855, 863 (1965):

> "Section 8(a)(3) prohibits discrimination in regard to tenure or other conditions of employment to discourage union membership. Under the words of the statute there must be both dis-

---

[2] The Record shows that as many as 75% of the striking employees had been replaced by July 1.

[3] The Company contends that the Board "changed horses" on the jurisdictional question since the *complaint* alleged that the unfair labor practice arose by failure to pay benefits due *under the contract*. Parties to an unfair labor practice charge are not to be held to strict rules of pleading, since the purpose of the complaint is merely to set in motion the machinery of an inquiry. N.L.R.B. v. Fant Mill[ing] Co., 3 L.Ed. 2d 1243 (1959); N.L.R.B. v. W. R. Hall Distributor, 341 F.2d 359 (10 Cir. 1965).

> crimination and a resulting discouragement of union membership. It has long been established that a finding of violation under this section will normally turn on the employer's motivation. See Labor Board v. Brown, 380 US 278, 13 L. ed 2d 839, 85 S Ct 980; Radio Officers' Union v. Labor Board, 347 US 17, 43, 98 L ed 455, 478, 74 S Ct 323, 41 ALR2d 621; Labor Board v. Jones & Laughlin Steel Corp., 301 US 1, 46, 81 L ed 893, 916, 57 S Ct 615, 108 ALR 1352."

Furthermore, the Court has required an *"affirmative"* showing by the Board of unlawful "motivation," *Local 357, International Brotherhood of Teamsters* v. *N.L.R.B.*, 6 L.Ed.2d 11 (1961); and, as we have often said, "an unlawful purpose is not lightly to be inferred," *N.L.R.B.* v. *McGahey*, 233 F.2d 406 (5 Cir. 1956).

The sole act of the Company upon which the Board made its finding of anti-union sentiment was the refusal to pay the vacation benefits. In effect, the Board held this act to be an ipso facto, per se violation. There was no supporting evidence whatsoever. To the contrary, the Board itself adopted the hearing examiner's conclusion in favor of the Company in a companion 8(a)(1) charge. There was also evidence presented in the hearing that the Company had gone to some lengths to *avoid* illegal employee pressuring.[4]

---

[4] The Hearing Examiner reported the following in his Decision:

> "Docie [Personnel Manager of Company] testified that when the strike began, he was instructed by Company Counsel not to solicit any employee to return to work, or to make any promises regarding 'fringe benefits or any favoritism'; that he followed these instructions 'implicitly.'"

The Trial Examiner credited this testimony.

Moreover, the Company contends it has never before been involved in an unfair labor practice controversy, and there is no record evidence that it has ever been so involved. We can narrow the question, therefore, to whether the act of withholding the benefits is *by itself* sufficient evidence of unlawful motive. The Supreme Court confronted substantially the same issue in *American Shipbuilding, supra*, and stated the following at 13 L.Ed.2d 863-4:

> "But we have consistently construed the section to leave unscathed a wide range of employer actions taken to serve legitimate business interests in some significant fashion, even though the act committed may tend to discourage union membership. See, e.g., Labor Board v. Mackay Radio & Telegraph Co. 304 US 333, 347, 82 L ed 1381, 1391, 58 S Ct 904. Such a construction of § 8(a)(3) is essential if due protection is to be accorded the employer's right to manage his enterprise. See Textile Workers v. Darlington Mfg. Co. 380 US 263, 13 L ed 2d 827, 85 S Ct 994.
>
> "This is not to deny that there are some practices which are inherently so prejudicial to union interests and so devoid of significant economic justification that no specific evidence of intent to discourage union membership or other antiunion animus is required. In some cases, it may be that the employer's conduct carries with it an inference of unlawful intention so compelling that it is justifiable to disbelieve the employer's protestations of innocent purpose."

Thus, we must decide whether the Company's withholding of vacation pay "carries with it an inference of unlawful intention *so compelling* that it is justifi-

able to disbelieve the employer's protestations of innocent purpose." (Emphasis added). We find that it does not. Based upon the term "so compelling", we conclude that if the "employer's conduct" carries with it *any other* reasonable inferences of a *legitimate motive*, the inference of illegality does not control. Although the record does not reveal any such alternative motives, we find it reasonable to infer that the Company might have acted (1) to reduce expenses; (2) to encourage longer tenure among present employees; or (3) to discourge early leaves immediately before vacation periods. We see nothing irregular about the failure of the Company to come forward with such evidence, although it might have benefitted their cause. The burden of proving motivation is on the Board. *N.L.R.B.* v. *McGahey, supra,* at 411.[5] When viewed in the light of the strong evidence showing otherwise exemplary conduct on the part of the Company during the strike, the argument

---

[5] As we stated in *McGahey* at 411:

> "Each was a perfectly sufficient explanation for the discharge of the particular employee and would itself sustain the burden, if it rested upon the employer, that the discharge of each was for the stated reasons. But the employer does not bear this duty. It is, rather on the General Counsel to establish by acceptable substantial evidence on the whole record that discharge came from the forbidden motives of interference in employee statutory rights. The burden long imposed by this Court, N.L.R.B. v. Miami Coca-Cola Bottling Co., 5 Cir., 222 F.2d 431; N.L.R.B. v. Brady Aviation Corp., 5 Cir., 224 F.2d 23; N.L.R.B. v. Alco Feed Mills, 5 Cir., 133 F.2d 419; N.L.R.B. v. Tex-O-Kan Flour Mills, 5 Cir., 122 F.2d 433; N.L.R.B. v. Ray Smith Transport Co., 5 Cir., 193 F.2d 142, has added sanction by express terms of the Act."

favoring the inference of illegality becomes increasingly weaker.

There remains the question, whether judged by the standards announced in *Oil City Brass Works* v. *NLRB*, 357 F.2d 466 (5 Cir. 1966), there is substantial evidence in this record as a whole to support a factual finding that these acts were improperly motivated.

This case may be compared to *Bi-Rite Foods, Inc.*, 1964 CCH NLRB Cases ¶ 12,132, 147 N.L.R.B. 59 (1964). In that case the company offered certain benefits but the Union turned them down, electing instead to strike. "The employer sent a letter to strikers, giving the date he would replace strikers if they did not return. He also stated that on that date he would put into effect the wage, holiday, and vacation offer, he made before the strike. Eight or nine strikers out of the twenty-eight or twenty-nine returned to work, and the employer put the changes into effect." 1964 CCH NLRB Cases ¶ 13,132 at 20, 941. The conduct in *Bi-Rite Foods, Inc.* was held not to constitute a refusal to bargain and, thus, not to be an unfair labor practice.

In the instant case essentially the same type of conduct took place. The terms of the vacation pay agreement were essentially the same as those the Union turned down as insufficient when it terminated the old contract. The fact that they applied only to employees who returned to work by July 1 is no more coercive than the implementation of new benefits in *Bi-Rite Foods, Inc.* In fact, it was not until July 12 that it became apparent the company would not pay the allegedly due benefits.

At the time the company refused to pay, a real question existed as to whether the replaced employees were entitled to those benefits. Two means existed

for settling that issue. One, the Union could have bargained over the exact rights of employees. Two, the employees affected could have brought suit under section 301.

This is not a refusal to bargain, but is a case where the employer was accused of discouraging union membership. Certainly its assertion of a contested right in this case is no more coercive than the replacing of economic strikers. Yet no one could contend that that violated section 8(a)(3) and (1).

This Board proceeding is devoid of circumstantial evidence on which to base an inference of improper motive. Nor is this the type of situation which the Board has seen so often that it can draw on a background knowledge of what is the usual intent of the employer. The complete absence of any primary facts on which an inference of improper motive can be based requires the conclusion that there is no substantial evidence in the record as a whole to support the Board's finding.

Having concluded, therefore, that there are insufficient facts shown by the record to support an inference of unlawful motivation, and that there is no substantial evidence in the record as a whole to support the conclusion that the Company violated Section 8 (a)(3) and (1) of the Act, the petition for enforcement is DENIED.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 22427

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

GREAT DANE TRAILERS, INC., RESPONDENT

DECREE

Before: Rives and Gewin, Circuit Judges, and Allgood, District Judge.

BY THE COURT:

THIS CAUSE came on to be heard upon the petition of the National Labor Relations Board for the enforcement of a certain order issued by it against the aforesaid Respondent on December 16, 1964. The Court heard argument of respective counsel on February 8, 1966, and has considered the briefs and transcript of record filed in this cause. On June 24, 1966, the Court being fully advised in the premises, handed down its decision denying Board's petition for enforcement of its order.

ON CONSIDERATION WHEREOF, it is ordered, adjudged and decreed by the United States Court of Appeals for the Fifth Circuit that enforcement of the said order of the National Labor Relations Board directed against Great Dane Trailers, Inc., its officers, agents, successors, and assigns, be and it hereby is denied.

ENTERED: July 21, 1966

APPENDIX B

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*) are as follows:

RIGHTS OF EMPLOYEES

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3).

UNFAIR LABOR PRACTICES

Sec. 8. (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * * * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided*, That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in section 8 (a) of this Act

as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9 (a), in the appropriate collective-bargaining unit covered by such agreement when made, and (ii) unless following an election held as provided in section 9 (e) within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: *Provided further*, That no employer shall justify any discrimination against an employee for non-membership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

* * * *

☆ U. S. GOVERNMENT PRINTING OFFICE: 1966 236008 381